



Alternate Care Systems:

Legal Issues In Public Health Emergencies

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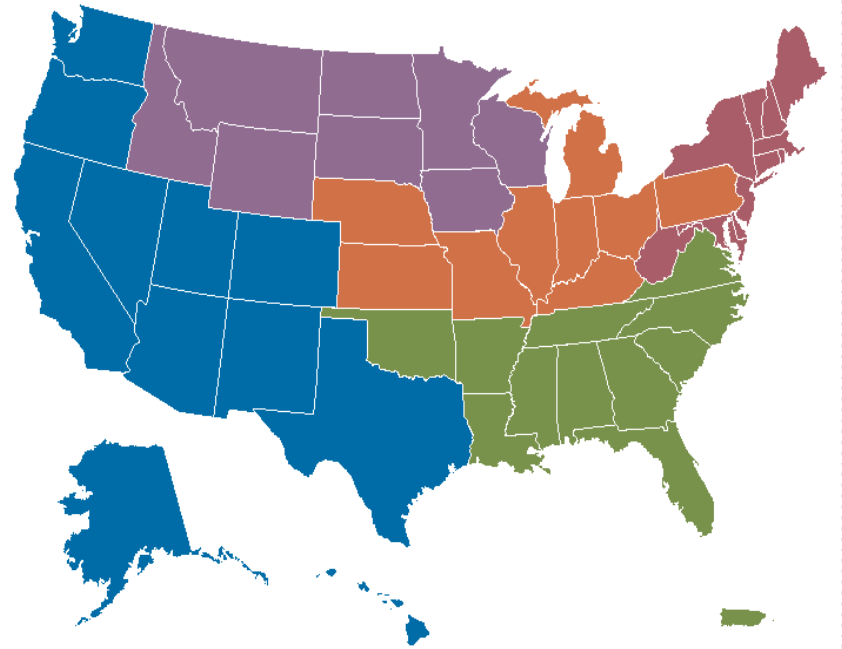
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Public Health Law Network

- Funded by the Robert Wood Johnson Foundation
- The PHL Network uses law to improve the public's health with public health lawyers, public health practitioners, and others
- Organized into 5 regions, the Network connects and serves individuals and organizations nationally through technical assistance, training, and other efforts



Who Can Use the Network?

Anyone committed to applying the law to improve the public's health can join the Network:

- Lawyers
- Public health practitioners
- Public health officials
- Policy-makers
- Public health and health care advocates
- Health care workers and leaders
- Public health/private sector organizations



Disclaimer

- ☐ *Please note that information provided during this session does not constitute legal advice.*
- ☐ *Please seek specific guidance from your legal counsel for direct, legal advice.*



Principal Objectives:

- The Legal Environment in Emergencies
- Regulation of Health Professionals and Entities
- Liability Issues
- Workers Compensation



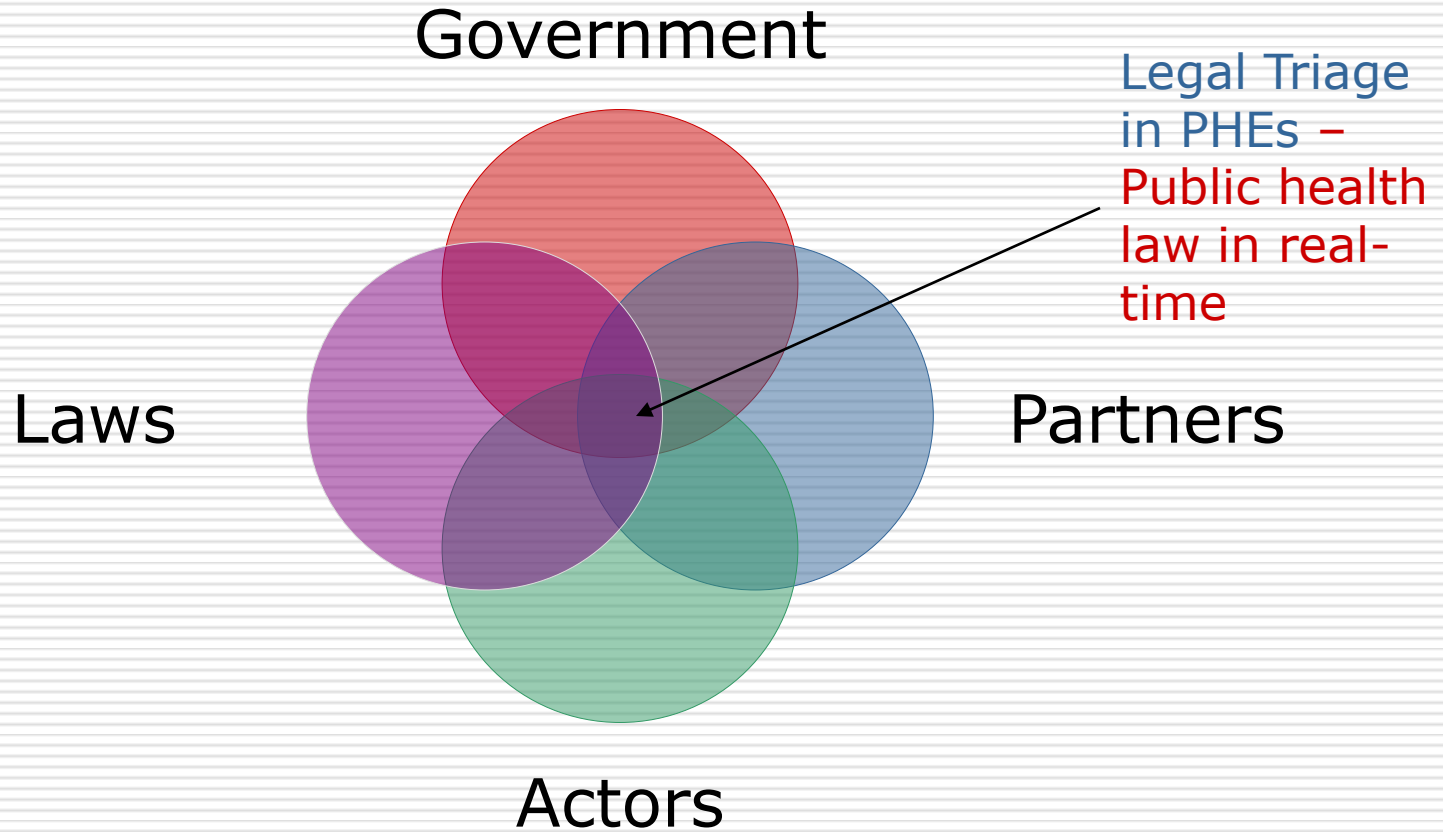
Assessing the Role of the Law in Public Health Emergencies

Laws pervade emergency responses at every level of government:

- They determine what constitutes a public health or other emergency
- They help create the infrastructure through which emergencies are detected, prevented, and addressed
- They authorize the performance (or nonperformance) of various emergency responses by a host of actors
- They determine the extent of responsibility for potential or actual harms that arise during emergencies



Legal Triage - 1



Legal Triage - 2

Legal triage refers to the efforts of legal actors and others to construct a favorable legal environment during emergencies through a prioritization of issues and solutions that facilitate legitimate public health responses.

Hodge, JG, Anderson, ED. Principles and practice of legal triage during public health emergencies. NYU Ann. Surv. Am. L. 2008; 64(2): 249-291.



Legal Triage - 3

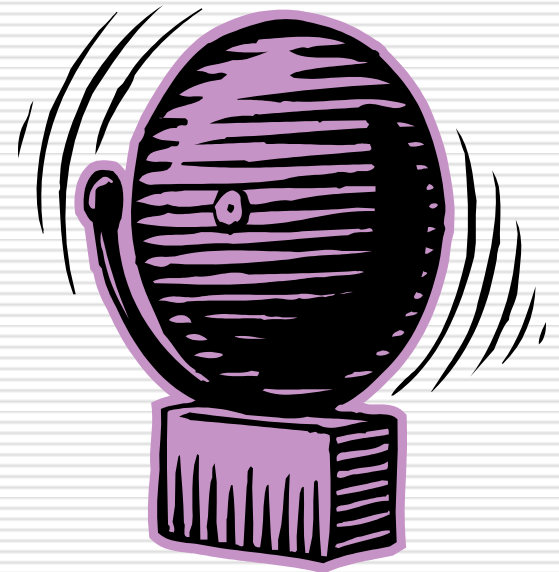
Legal actors and others must be prepared to:

- **assess and monitor changing legal norms** during emergencies;
- **identify legal issues** that may facilitate or impede public health responses as they arise;
- **develop innovative, responsive legal solutions** to reported barriers to public health responses;
- **explain legal conclusions** through tailored communications to planners and affected persons; and
- consistently **revisit the utility, efficacy, and ethicality** of legal guidance.



Legal Landscape in Emergencies - 1

*Once an emergency has been declared, the **legal landscape changes.***

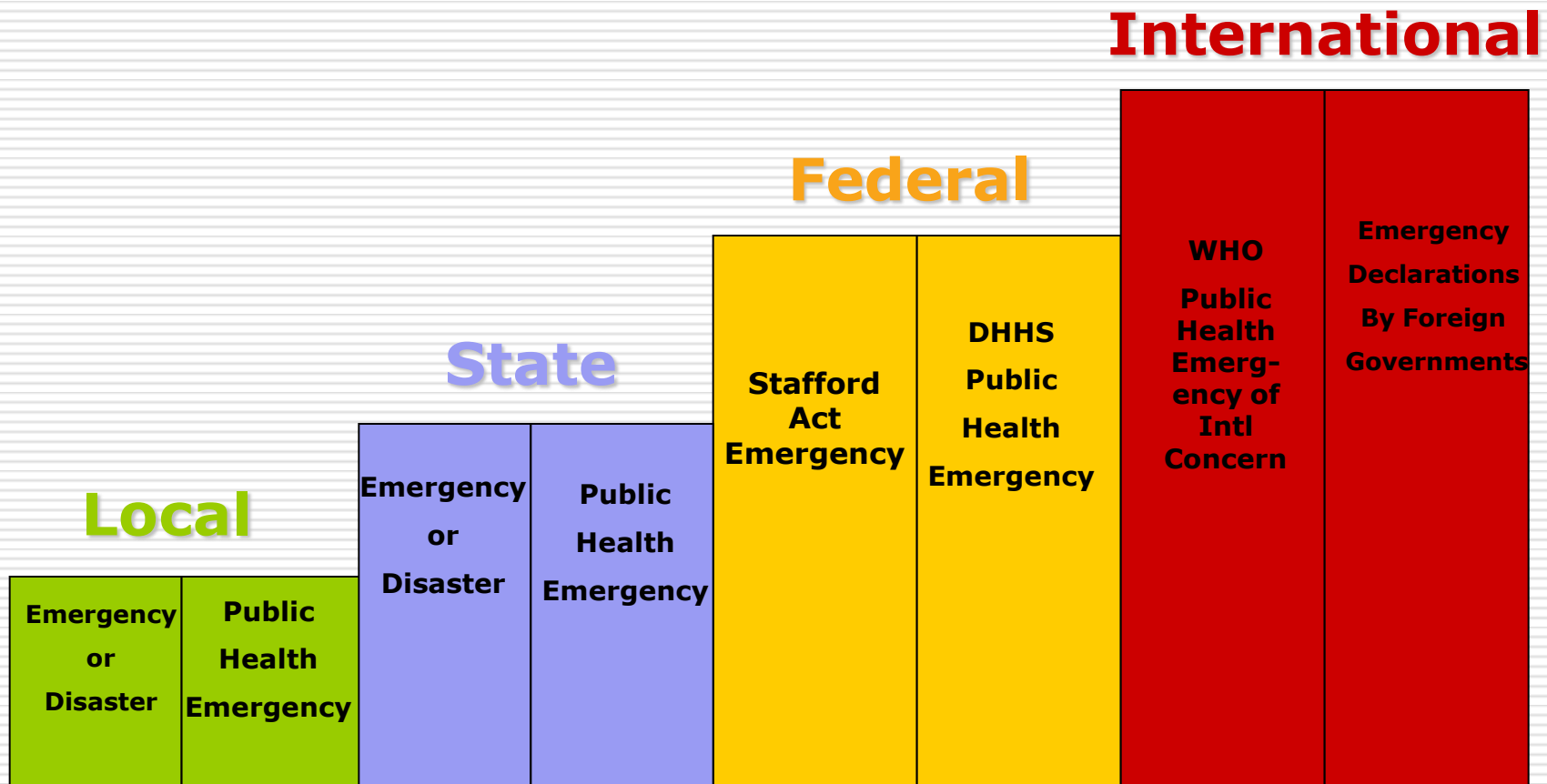


Legal Landscape in Emergencies - 2

How the legal landscape changes depends on the type of emergency declared



Levels of Emergency Declarations - 1



"Emergency" Defined - Arizona

"*State of emergency*" means "the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, **epidemic**, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision."

Ariz. Rev. Stat. § 26-301 (2006)



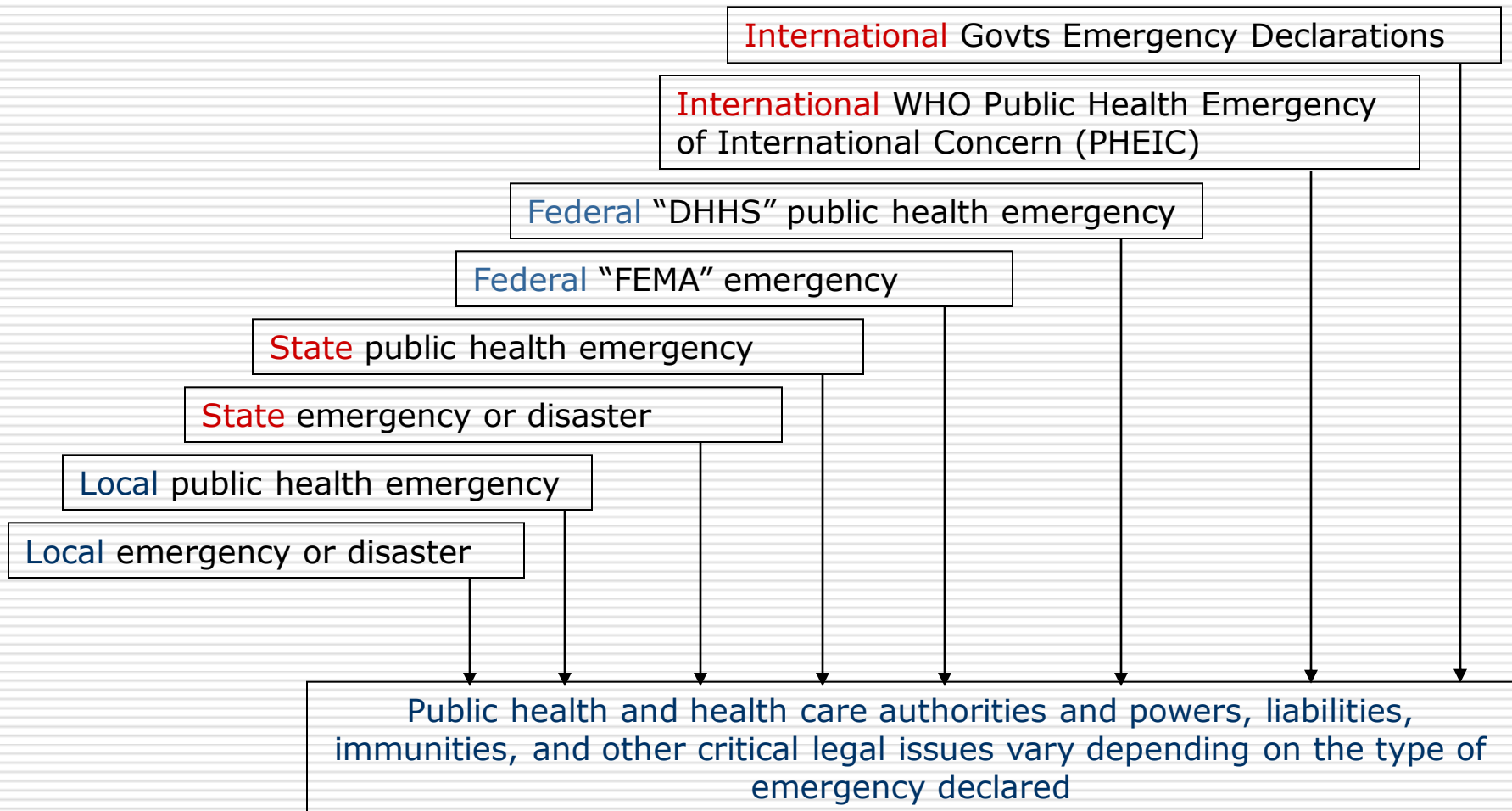
“Public Health Emergency” Defined - Arizona

“A state of emergency or state of war emergency declared by the governor in which there is an occurrence or imminent threat of an illness or health condition caused by bioterrorism, an **epidemic** or pandemic disease or a highly fatal infectious agent or biological toxin and that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability.”

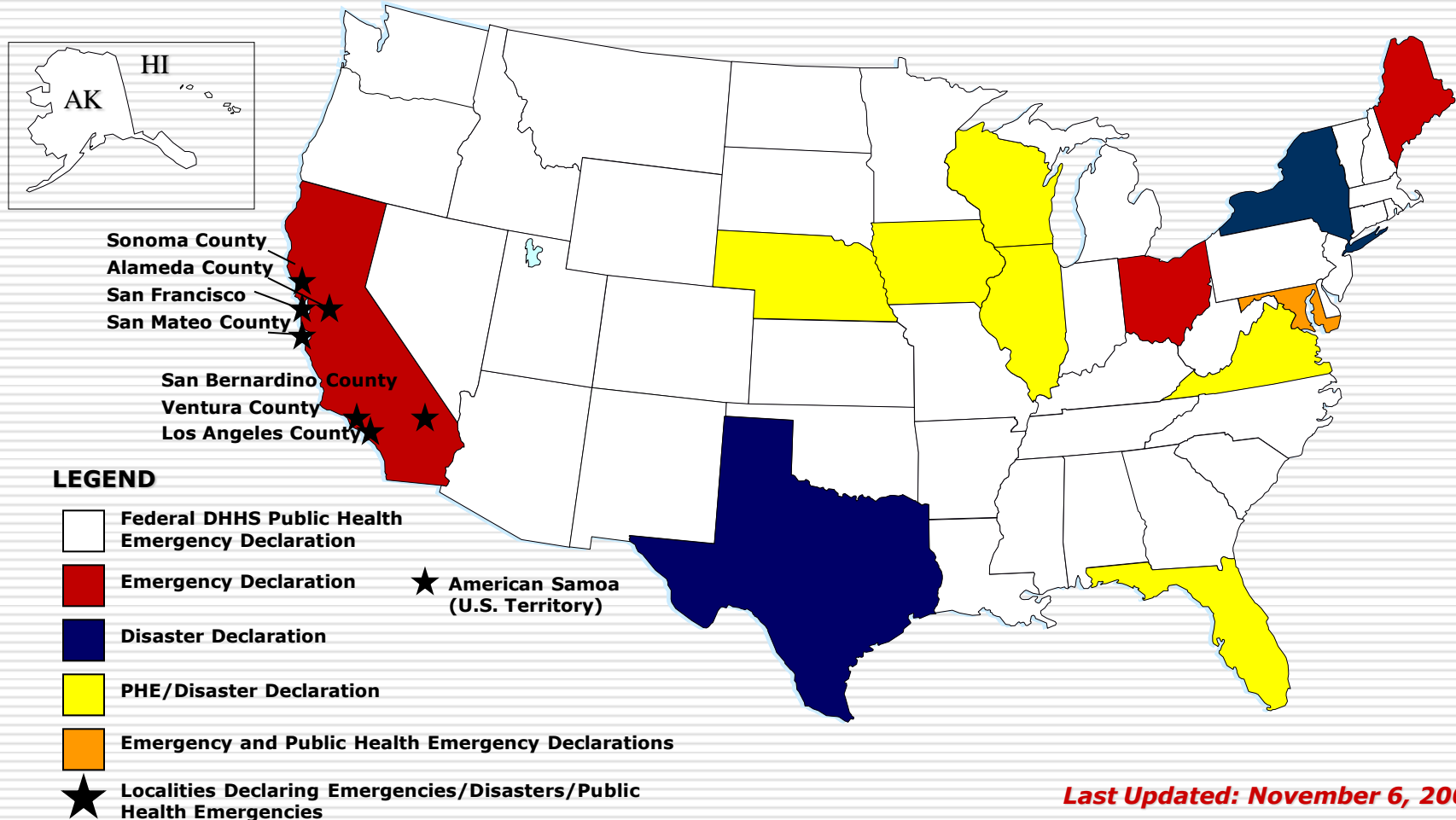
Ariz. Rev. Stat. § 36-787 (2006)



Levels of Emergency Declarations - 2



Emergency, Disaster, and Public Health Declarations – 2009 H1N1 Flu



Last Updated: November 6, 2009



Public Health Emergency Powers – Model State Emerg Health Powers Act

Individuals are
bestowed special
protections and
entitlements



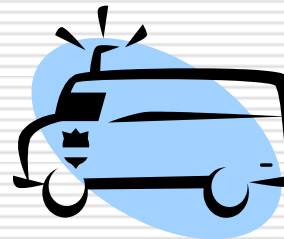
Government is
vested with
specific, expedited
powers to facilitate
emergency
responses



Licensing and
credentialing
requirements
may be
waived



Volunteer
responders
may be
protected from
civil liability



2009 H1N1 Flu: National Declarations - 1

- **April 26, 2009**: U.S. DHHS Secretary declares a national state of **public health emergency**

- Pursuant to the **Public Health Service Act, 42 U.S.C. § 247d**

- Allows federal, state, and local agencies to utilize federal resources to prevent and mitigate the spread of H1N1

- Renewed by DHHS in July and October for subsequent 90 day periods



2009 H1N1 Flu: National Declarations - 2

October 24, 2009- President declares a **National Emergency** pursuant to the Stafford Act

"[G]iven that the rapid increase in illness across the Nation may overburden health care resources and that the temporary waiver of certain standard Federal requirements may be warranted in order to enable U.S. health care facilities to implement emergency operations plans, **the 2009 H1N1 influenza pandemic in the United States constitutes a national emergency.**"

*U.S. President, Barack Obama
White House, Office of the Press Secretary, Washington, D.C.*



2009 H1N1 Flu: National Declarations - 3

DHHS' Public Health Emergency +
Stafford Act National Emergency =
Host of Additional Federal
Emergency Powers



Medicare/Medicaid Reimbursement

DHHS can waive certain Medicare/Medicaid reimbursement policies:

- Patients may **see any doctor** that accepts Medicare patients, even if the patient's need is not an emergency
- Patients in a Medicare Advantage plan (such as an HMO or PPO) do not have to meet their plan's **prior authorization and/or out-of-network** rules.
- Patients **pay the in-network rate** for out-of-network or out-of-area care during the emergency.
- Patients **are not required to go to their usual pharmacy** if their prescription drugs are lost, damaged, or inaccessible.



Health Information Privacy - HIPAA

- **DHHS may also waive sanctions against covered entities concerning select provisions of the HIPAA Privacy Rule including the:**
 - Requirement to obtain a [patient's agreement to speak with family members or friends](#) involved in the patient's care;
 - Requirement to honor a request to [opt out of the facility directory](#);
 - Requirement to [distribute a notice](#) of privacy practices;
 - Patient's right to request [privacy restrictions](#); and
 - Patient's right to request [confidential communications](#).

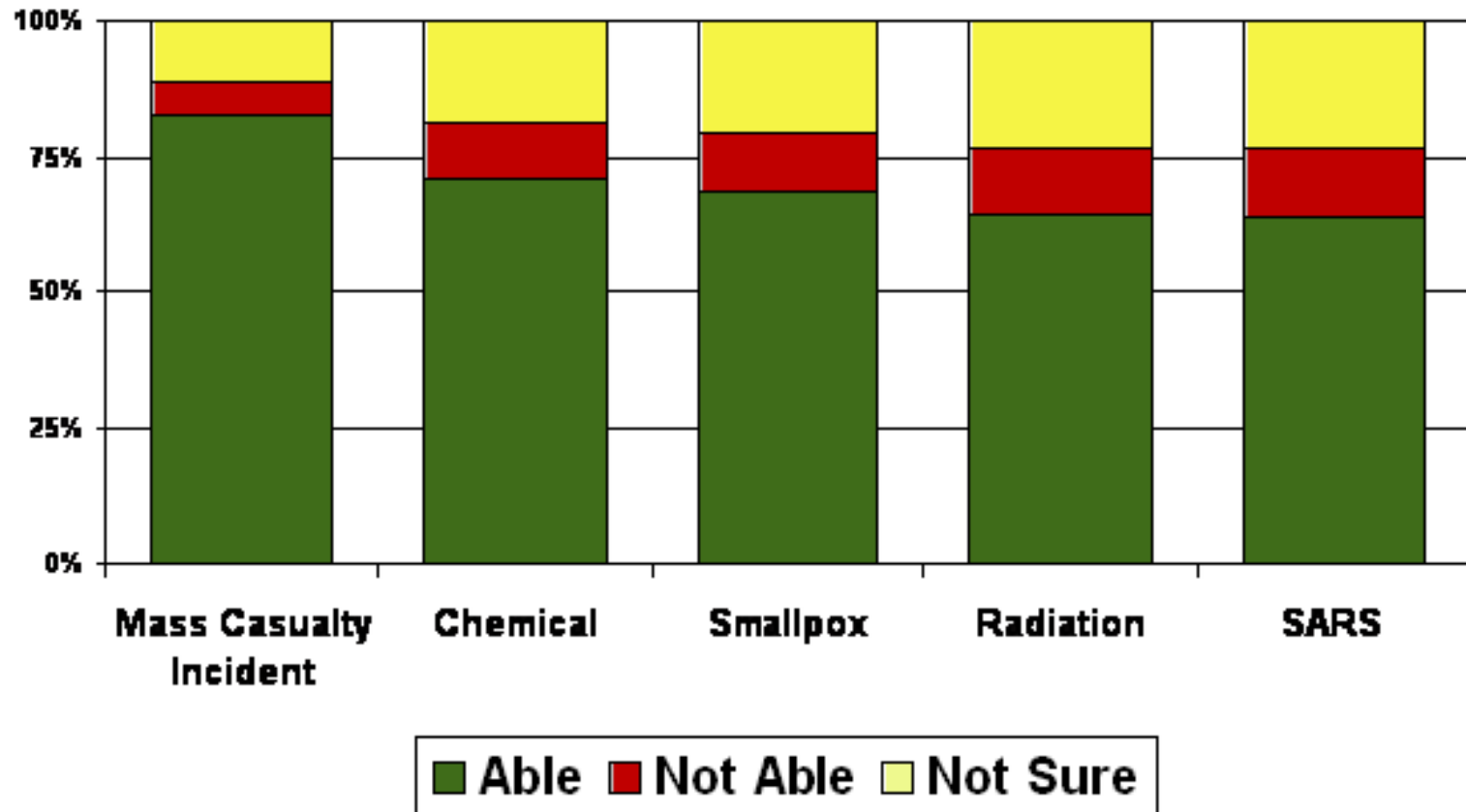


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Ability of Health Care Workers to Report to Work During an Emergency

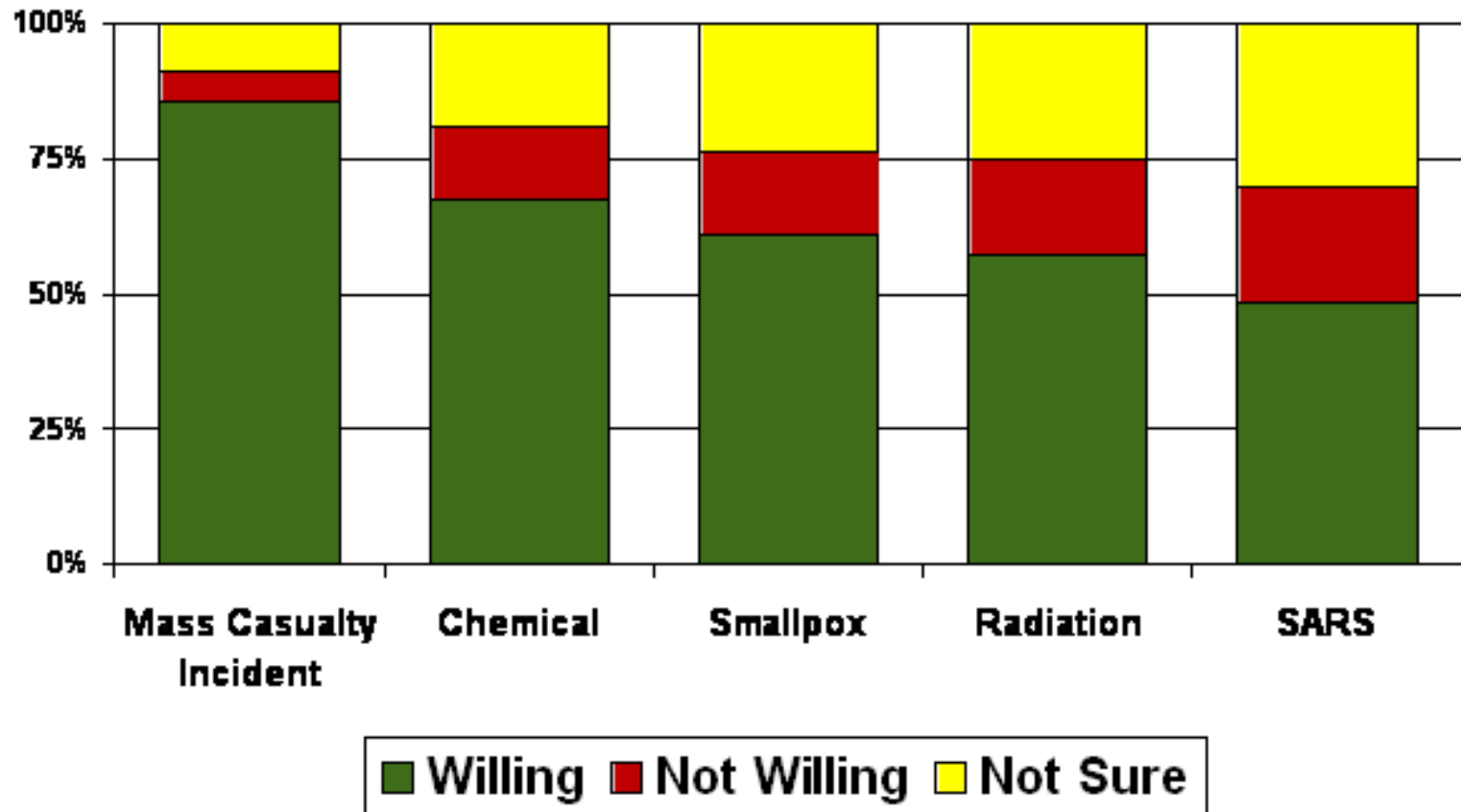


N = 6,428 health care workers in 47 facilities

Source: Qureshi K, Gershon RRM, Sherman MF, Straub T, Gebbie E, McCollum M, Erwin MJ, Morse SS. Health care workers' ability and willingness to report to duty during catastrophic disasters. *Journal of Urban Health*. 2005;82(3):378-388.



Willingness of Health Care Workers to Work During a Pandemic



N = 6,428 health care workers in 47 facilities.

Source: Qureshi K, Gershon RRM, Sherman MF, Straub T, Gebbie E, McCollum M, Erwin MJ, Morse SS. Health care workers' ability and willingness to report to duty during catastrophic disasters. *Journal of Urban Health*. 2005;82(3):378-388



Licensure Reciprocity

- When can health professionals practice across state lines?
 - **Emergency Declarations** and other laws allow states to waive normal laws for professional licensure, certification, and privileging during a declared emergency and to recognize out-of-state health professionals.
 - **Emergency Management Assistance Compact (EMAC)** provides similar licensure reciprocity for state agents
 - Other **reciprocity agreements** may apply (e.g., Nurse Licensure Compact)

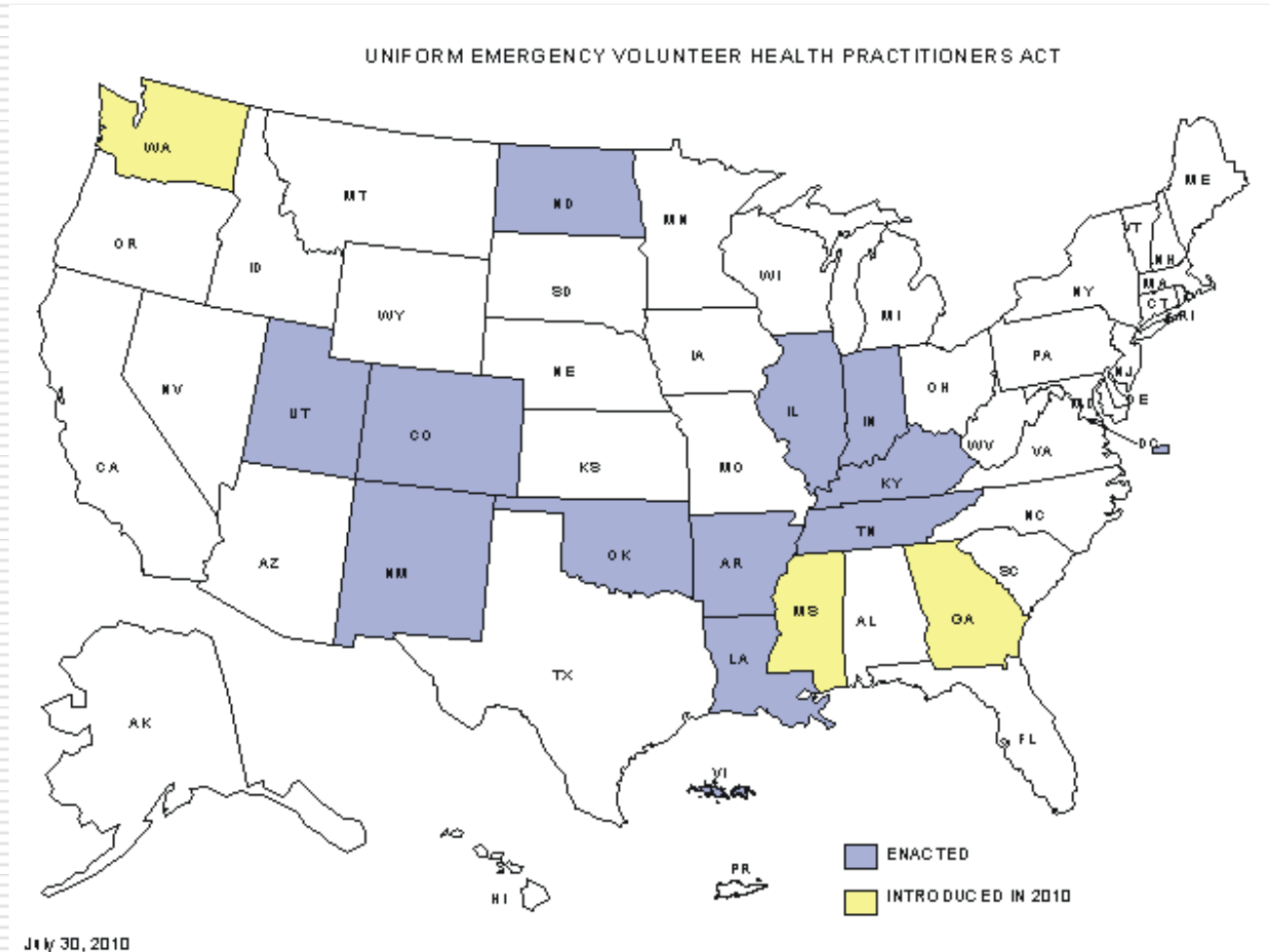


Scope of Practice

- **Defined** - extent of a licensed or certified professional's ability to provide health services pursuant to their competence and license, certification, privileges or other lawful authority to practice.
- **Uniform Emergency Volunteer Health Practitioners Act** ~ volunteer health practitioners cannot provide services that are **outside the practitioner's own scope of practice** *even if* a similarly-situated practitioner in the state is permitted to provide the same services.



Uniform Emergency Volunteer Health Practitioners Act (UEVHPA)



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Civil Liability

- **What is civil liability?**



Civil liability is the potential responsibility that a person or institution may owe for their actions, *or failures to act*, that result in injuries or losses to others.



Who May Face Civil Liability?



**Health care
workers and
volunteers**



**Health care
entities or
employers**



**Persons or
entities
responsible for
emergency
responses**



Civil Liability

- **Legal theories:**

- Negligence
- Intentional torts
- Misrepresentation
- Patient Abandonment
- Discrimination



Civil Liability: Potential Examples

- A physician administers pain medication to a patient without knowledge of other medications the patient is taking, resulting in a patient's adverse reaction (**Negligence**)
- A health care provider administers a procedure without specific patient informed consent (**Intentional Tort – Battery**)
- A nurse administers medical care to a patient who believes that the nurse is a physician (**Misrepresentation**)



Patient Abandonment

- **Defined:** Abandoning professional obligations by a group practice, hospital, clinic, or health care worker *without reasonable notice* and under circumstances which seriously impair the delivery of professional care to patients.
- May constitute elder abuse subject to **civil and criminal** penalties



Discrimination - Americans with Disabilities Act (ADA)

- Individuals with disabilities cannot be discriminated against for the purposes of medical treatment. [Title III, 42 U.S.C.S. § 12182](#)
- Patients may sue for denials of treatment under the ADA if (1) the patient does not pose a direct threat and (2) is refused treatment because he/she has a disability, or is regarded as having a disability.



Health Care Entities - Liability

Theories of Liability:

- **Vicarious Liability**

“Let the master answer”

- **Corporate Liability**

Corporations may be responsible for actions or omissions by their employees

- **Ostensible Agency**

Entity may be liable because of a patient's view that workers are employees (& not ICs)



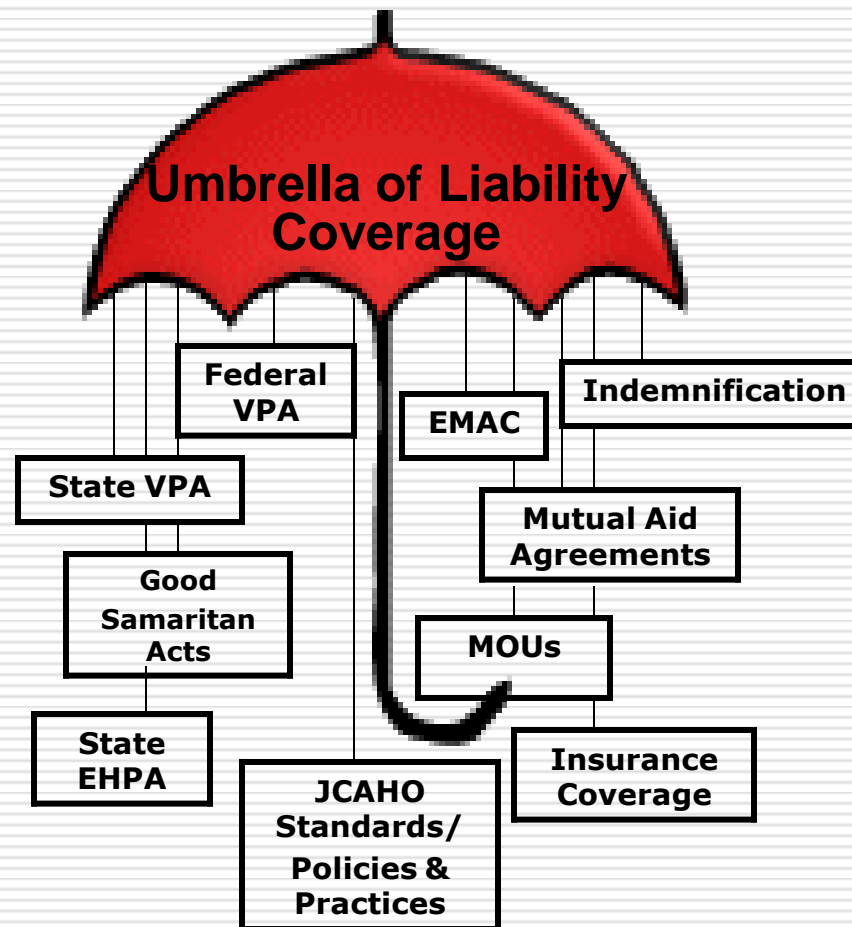
Risks of Civil Liability



**Liability Risks to HCWs,
Entities, and Coordinators**



Liability Protections in Emergencies



Good Samaritan Law - AZ

Health care providers licensed or certified to practice . . . in this state or elsewhere, or a licensed ambulance attendant, driver or pilot, or any other person who renders emergency care at a public gathering or at the scene of an emergency occurrence gratuitously and in good faith *shall not be liable for any civil or other damages* as the result of any act or omission by such person rendering the emergency care, or as the result of any act or failure to act to provide or arrange for further medical treatment or care for the injured persons.



Volunteer Protection Laws - AZ

A **volunteer** is immune from civil liability in any action based on an act or omission of a volunteer resulting in damage or injury. The acts must be within the scope of the **volunteer's official functions** and duties for a **nonprofit corporation or nonprofit organization, hospital or governmental entity**.

Ariz. Rev. Stat. § 12-982 (2006)



Entity Liability Protections - **AZ**

□ Governmental Immunity of Public Entities:

- This state and its departments, agencies, boards, commissions and all other political subdivisions **are not liable** for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty by any emergency worker, excepting willful misconduct, gross negligence or bad faith of any such emergency worker, in . . . performing emergency functions

Ariz. Rev. Stat. § 26-314(A)



Entity Liability Protections -Nationally

- ❑ **UNC Gillings School of Global Health –**
- ❑ **Good Samaritan Entity Liability Protection: Tools for Advocates**
 - State level coalitions comprised of interested stakeholders from public health, emergency management, business and non-profit entities, professional associations, and academia seeking to provide “Good Samaritan Entity Liability Protection.”
 - Available at:
<http://nciph.sph.unc.edu/law/tools/index.htm>



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Workers' Compensation - 1

- In non-emergencies, workers' compensation protects employees who are injured or killed at work
- *Rule is simple* – if you get hurt at work, employer pays regardless of liability
- In **emergencies**, this rule is not so clear:
 - Extent of workers' comp insurance plans
 - Extent of coverage for non-employees (like volunteers)



Workers' Compensation - 2

- **Who is an employee?**
 - Absent a state law extending workers' compensation to volunteers, unpaid individuals who respond to emergencies are not covered because they are not "employees"
 - Narrowly written laws that appear to cover volunteers may not apply if the:
 - Employer opts not to cover volunteers; or
 - Volunteer has not registered.



Workers' Compensation - 3

- **Who is the employer?**

- The employer from the “home” state is not likely responsible for injuries to volunteers because they act outside the course of employment (unless the employer specifically offers to provide coverage).
- Temporary “host” employer may be the state or municipal government.
- In default, “host” institution may be responsible.



Workers' Compensation - 4

- When is a volunteer acting within the scope of her employment? – coverage only extends to acts generally within the scope of employment.
- When is a volunteer “injured” during emergency responses? – questions as to the timing of physical or mental injuries arise, especially among states that lack comprehensive occupational health or mental health provisions.



Additional Information

- CDC, Long-Term Care and Other Residential Facilities Pandemic Influenza Planning Checklist (2010),
<http://pandemicflu.gov/professional/hospital/longtermcarechecklist.html>
- IOM, Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations: A Letter Report (2009)
<http://www.iom.edu/Reports/2009/DisasterCareStandards.aspx>
- AHRQ, *Home Health Care in Pandemic Influenza* (2008)
<http://www.flu.gov/professional/hospital/homehealth.html>
- DHHS, ESAR-VHP Legal and Regulatory Issues Report (2008)
- *ASU Public Health Law and Policy Program*
[<http://www.law.asu.edu/?id=1980>]



Contact the Western Region

- Visit publichealthlawnetwork.org
- Call or email the Western Region from 9:00 a.m. – 5:00 p.m.
 - 480-727-2092
 - jarias@publichealthlawnetwork.org



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- ***Thank you!***

